Parody and Burlesque in the Law of Copyright

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I. *Of Parody and Burlesque*

The object of this article is to consider the problem of parody and burlesque as affected by the law of copyright. While the terms are often used interchangeably, differences in their meanings can be illustrated by giving the definitions of the two terms in their historical settings from the Shorter Oxford English Dictionary. *Parody* is there defined:

> 1. A composition in which the characteristic turns of thought and phrase of an author are mimicked and made to appear ridiculous, especially by applying them to ludicrously inappropriate subjects. Also applied to a burlesque of a musical work.

Burlesque is defined in the same work in this manner:

> 1. That species of composition which excites laughter by caricature of serious works, or by ludicrous treatment of their subjects; a literary or dramatic work of this kind. Also attrib. 1667.
>
> 2. Grotesque caricature; concr. an action or performance which casts ridicule on that which it imitates, or is itself a ridiculous attempt at something serious; a mockery 1753.

Webster's New International Dictionary (2nd edition) recognizes in its definition of the word the emergence in the nineteenth century of dramatic burlesque as a distinct American form of entertainment:

> 3. A type of theatrical entertainment, developed in the United States in the late nineteenth century, characterized by broad humor and slapstick presentation, at first consisting of a musical travesty, but later of short turns, as songs, ballet dancing, and caricatures of well-known actors or plays.

Burlesque is thus sheer travesty or distortion, while in parody the

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very substance and style of the author is followed closely but is used to apply lofty words of characterization to lowly or inconsequential things.

In essence, both parody and burlesque are *criticisms* by ridicule of the persons or the work to which they are directed. Historically, burlesque has been directed more at dramatic works. In fact, the word is traceable to an Italian writer, Francesco Berni, who, in the sixteenth century, composed a series of burlesque operas under the title "Opere Burlesche". At times it is difficult to apply the terms correctly to particular works.

Important literary works, such as Chaucer's *Ryme of Sir Thopas*, Butler's *Hudibras*, Beaumont and Fletcher's *Knight of the Burning Pestle*, the second Lord Buckingham's *The Rehearsal*, Gay's *Beggar's Opera*, Fielding's *Shamela* and Sheridan's *Critic*, have been classified by literary historians under either heading. Each ridiculed and sought to mock either particular works or a *genre:* Chaucer, the medieval romances of chivalry; Buckingham, the heroic medieval drama; Fielding, Richardson's *Pamela*—as did Max Beerbohm, in more modern times, when he mocked George Meredith in *Seven Men.*

With the development of the new media of communication and diffusion of the spoken word, especially radio and television, and the American vogue of comedians in these media, the problem of parodying well-known literary works assumes added importance. So we discuss the relation of this form of creation to the law of copyright and its chief aim.

Through copyright an author acquires a monopoly "to prevent others from producing the copyrighted work".[1] In the last analysis, however, the object of all copyright legislation is to carry into effect the constitutional mandate of granting to authors, for limited periods of time, the exclusive right to their writings in order "to promote the Progress of Science and useful Arts".[2]

II. *The Object of Copyright*

In seeking to solve new problems in the field of copyright, this prime object must be kept in view at all times.[3] While the rights of the copyright owner are to be protected, this is not the primary consideration of the courts. As said by the Supreme Court of the United States:

[1] *R.C.A. Mfg. Co., Inc.* v. *Whiteman* (1940), 114 F. 2d 86, at p. 88 (2nd Cir.).
[2] United States Constitution, art. I, s. 8.
[3] *Chamberlin* v. *Uris Sales Corp.* (1945), 150 F. 2d 512 (2nd Cir.).

> The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. In *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, 127, Chief Justice Hughes spoke as follows respecting the copyright monopoly granted by Congress, 'The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors'.[4]

For these reasons and to ensure continuity of development in literature, art and scientific thought, American courts, under the doctrine of "fair use", have conceded the right to appropriate portions of the copyrighted work of others.[5]

The general criteria for determining whether use is fair are stated by the Court of Appeals for the District of Columbia in this manner:

> . . . the value of the part appropriated; its relative value to each of the works in controversy; the purpose it serves in each; how far the copied matter will tend to supersede the original or interfere with its sale; and other considerations.[6]

This approach achieves a dual aim. It protects the author in his legitimate ownership rights and, at the same time, achieves the expressed constitutional object. A different approach would limit, not only creation, but the very development of literature, arts and sciences. Judge Learned Hand has put the matter very tersely:

> The 'sole liberty of printing, publishing and vending' the 'work' means the liberty to make use of the corporeal object by means of which the author has expressed himself; *it does not mean 'the sole liberty' to create other 'works' even though they are identical. Were it not so the man who first made and copyrighted a photograph under section 5(j) of Title 17, U.S. Code, 17 U.S.C.A. Sec. 5(j), could prevent every one else from publishing photographs of the same object.*[7]

A similar motive lies behind the rule which denies proprietorship to ideas, and limits copyright protection to the method of their expression.[8] In this respect the law is pragmatic. As the number of ideas is limited, if their first expression were to give sole ownership, their unfoldment and development—the very essence of artistic and literary growth—would be impeded. The borrow-

[4] *United States* v. *Paramount Pictures* (1948), 334 U.S. 131, at p. 158.
[5] Yankwich, What Is Fair Use? (1954), 22 U. of Chi. L. Rev. 203.
[6] *Carr* v. *National Capital Press* (1934), 71 F. 2d 220 (D.C. Cir.).
[7] *Arnstein* v. *Edward B. Marks Music Corp.* (1936), 82 F. 2d 275 (2nd Cir.) (emphasis added). And see, *Oxford Book Co.* v. *College Entrance Book Co.* (1938), 98 F. 2d 688, at pp. 690-691 (2nd Cir.); *Kaeser & Blair, Inc.* v. *Merchants' Ass'n.* (1933), 64 F. 2d 575, at p. 577 (6th Cir.).
[8] Copyright "does not protect a subject, but only the treatment of a subject": *F. W. Woolworth Co.* v. *Contemporary Arts* (1951), 193 F. 2d 162, at p. 164 (1st Cir.). And see, Yankwich, Originality in the Law of Intellectual Property (1951), 11 F.R.D. 457, and Melville B. Nimmer Law of Ideas (1954), 27 So. Cal. L. Rev. 119.

ing of ideas from others has been continuous from the beginning of creative literature—from Homer onward. Virgil, who himself was charged with borrowing from Homer, accepted the fact as the law of life when he wrote:

> Hos ego versiculos feci, tulit alter honorem,
> Sic vos non vobis nidificatis aves
> Sic vos non vobis vellera fertis oves
> Sic vos non vobis mellificatis apes
> Sic vos non vobis fertes aratra boves.
>
> [I wrote these lines, another wears the bays,
> Thus you for others make your nests, O Birds,
> Thus you for others bear your fleece, O Sheep,
> Thus you for others honey make, O Bees,
> Thus you for others drag the plough, O Kine][9]

So in considering the right to parody and burlesque copyrighted materials, its recognition and scope can only be determined in the light of the historical fact that, while burlesque is a comparatively modern form of art dating to the late sixteenth or early seventeenth century, parody has been recognized as a distinct artistic creation almost from the very beginning of literature, dramatic or other. So I shall use "parody" as the broader term and confine "burlesque" to those dramatic travesties to which it has been applied in more recent times.

III. *Parody in Retrospect*

Aristotle has called Hegemon of Thasos "the inventor of parodies".[10] Hegemon received a prize at Athens for his *Gigantomachia* (The Battle of the Giants), which was a parody on the alleged victorious exploits of what was, in reality, defeat of the Athenians in Sicily. But scholars point to the fact that another parody on Homer entitled *Batrachomyomaechia* (The Battle of the Frogs) preceded Hegemon's work and those of Athenaeus. Athenaeus himself regards Hipponax of Ephesus, who wrote a parody of the Iliad, as the real inventor of this poetic form. And students point to the fact that the parody known as the *Margites*, of which nothing survives, but the existence of which has been attested to by others, dates to the seventh or eighth century before the Christian era. The form came to full and recognized fruition in Aristophanes, who used it to mock Aeschylus and Euripides in *The Knights*, *The Frogs* and *The Acharnians*, in which he made them speak parodies of their own style.

[9] Vitae Vergilianae 31 (Brummer ed., 1912).
[10] Aristotle, Poetics, II (4 Butcher's translation, 1907, p. 11).

Another Greek writer in the field, little known to anyone but the experts, is Lucian, who lived in the second century A.D., and whose parodies on the Greek gods have been characterized by one writer as spreading a rollicking humour that is "irresistible".[11]

Poetical parody was cultivated by the Romans. The best known examples are a poem in the *Catalepton* in which one of Catullus's poems is parodied and the *Antibucolica* of Numitorius, which are taken as parodies on some of Virgil's Eclogues. The Satires of Persius contain some parodies. During the Middle Ages, on the continent of Europe, burlesques found their way into the paintings on church walls. There were also burlesques of the Scriptures, the church offices and parodies of the mass itself. Cervantes' *Don Quixote* began as a parody on the Spanish novel of chivalry and ended by creating two of the greatest characters in all literature, Don Quixote and Sancho Panza.

In France in the seventeenth century, Paul Scarron attained fame through a parody on Virgil entitled *Virgile Travesti*, which Charles Cotton, in England, imitated in *Virgil Travestie*. Scarron's contemporary, Saint-Amant, is considered by modern students of French literature far superior to him as a parodist. While everyone admits Scarron's cleverness, the consensus is that his work lacks the poetic qualities of Saint-Amant's. In the eighteenth century, Marivaux parodied the Iliad, and the works, ideas and methods of expression of Corneille, Racine, Voltaire, Rousseau and Beaumarchais, to name only the great, were parodied mercilessly. So were also popular plays by less known authors, like de la Motte's *Ines de Castro*.[12]

[11] The Oxford Classical Dictionary (1949) Article, Greek Parody, p. 649.

[12] Bédier et Hazard, Littérature Française, (1948), Vol. 1, pp. 343-346. See, V. B. Grannis, Dramatic Parody in Eighteenth Century France (1931). This writer traces French parody back to the eleventh century. Of the continuity of its character, she writes:

"We find, aside from Greek and Latin parodies, a very considerable number in France, dating from the eleventh century and including parodies of even prayers and religious ceremonies. The seventeenth century furnished some notable examples. At that time, the same spirit manifested itself largely in the burlesque form, which attained such enormous favor with Sorel and particularly Scarron. There were burlesques of everything from the most trivial to the most solemn and sacred objects. The genre, by its very abundance brought about its end through satiety, but with the eighteenth century, came a marked revival of it. Scarron's works, in whole or in part, ran through seventeen editions during the century and the wits found his irreverent jestings greatly to their taste. With the eighteenth century came a comparative freedom of the stage and the satiric spirit took consistently dramatic form for the first time, because for the first time it was physically possible for the plays to be staged. Thus the theatrical parody does not arise as a sudden and isolated phenomenon so much as it diverts into this particular channel a current long existent in French literature, from the fabliaux and the biting satires of the Middle

Pastiche is a special form of parody which caricatures the manner without using the exact words of the work parodied. Marcel Proust, the great modern French novelist, shortly after World War I, wrote a whole series under the title *Pastiches*. He took an actual incident which occurred in 1909. A Monsieur Lemoine, in that year, pretending to have the secret of manufacturing diamonds, obtained a large sum of money from Sir Julius Werner, president of de Beers. When the swindle was discovered, Sir Julius denounced Lemoine to the French police and he was finally convicted of fraud and sent to prison. Proust called the incident *L'Affaire Lemoine* and proceeded to treat it as Balzac and Flaubert would have done in one of their novels. Then he wrote a *pastiche* of the manner in which Sainte-Beuve, the French critic and contemporary of Flaubert, would have commented on the Flaubert treatment in one of his *feuilletons* in *Le Constitutionnel*. He followed this by *pastiches* on the manner in which other great French critics and writers would have dealt with it: Henri de Regnier; the Goncourts (in their Journal); Michelet, the historian; Faguet, the critic; Renan and Saint-Simon. The entire work is one of the cleverest of modern parodies and shows the esteem in which the art is still held in France.

In English literature all the great poets from Chaucer onward wrote parodies. Shakespeare parodied Marlow, and his own *Venus and Adonis* was parodied by Marston. John Phillips wrote a burlesque of *Paradise Lost* under the title *The Splendid Shilling*. Swift wrote parodies in verse and prose. In the realm of modern English poetry Swinburne parodied very successfully the style of the poets of his day, in *Heptalogia*. Men like C. S. Calverly, J. K.

Ages, through the broad humor of a Rabelais and the irony of a Boileau." (Pp. 11-12).

She sees in the manner in which the *genre* is practised in France a brilliant expression of the French spirit:

"Above all, the parodies must be viewed as fitting into the long tradition of satirical writing which holds so large a place in French literature. The French have always delighted in caustic wit and they like to laugh at themselves and others. The parodies, then, with their merriment, ranging from the crudest of slapstick comedy to the most subtle and sophisticated witticisms of a sharply critical esprit, are but one form of outlet for this spirit, which has always been present in one form or another. The *fabliaux* were an early manifestation of the same type of thing, as were the bitterly satirical anti-feministic writings of the fifteenth century, or the Roman de Renart with its cutting sarcasms, the brilliant, all-encompassing satires of Rabelais, the irony of Boileau, or the burlesque genre which enjoyed such extended favor in the seventeenth century. The parodies were not, then, a disconnected phenomenon which sprang into being without any preparation, but rather they were the particular form in which this satire cast itself at the moment. They were the eighteenth century expression of the caustic and irreverential *esprit gaulois*, which is the perennial delight of generations of laughter-loving French." (Pp. 406-407)

Stephen, Sir Owen Seaman, Sir John Squire and Horace and James Smith acquired notable standing as parodists. The Smiths are known for the imaginary *Rejected Addresses* written in the style of the poets of the day on the reopening of the Drury Lane Theater in 1812. Sir Owen Seaman, in the *Battle of the Bays*, parodied the poets of the day, including the poets laureate.

Coming to the modern English novelists, reference has already been made to Fielding's *Shamela*, a burlesque of Richardson's *Pamela*. His *Joseph Andrews* was also conceived as a parody on Richardson. Fielding wrote other parodies: *Tom Thumb the Great and Pasquil*. Thackeray's *Novels by Eminent Hands* parodied the popular novelists of his day: Lytton, Lever, Disraeli and others. More recently, Max Beerbohm parodied George Meredith and other novelists in his *Seven Men*. Gilbert à Beckett, the author of a *Comic History of England*, also wrote *The Comic Blackstone*.

Burlesque was especially strong in the theater of the nineteenth century in England. Practically every important play brought forth a corresponding burlesque. The *Hunchback of Notre Dame* resulted in a burlesque entitled *Quasimodo, The Deformed or The Man with the Hump. The Three Musketeers* was burlesqued as *The Three Musket Dears, The Gay Musketeers, All For Number One. Trilby* was burlesqued as *A Model Trilby or A Day or Two After Du Maurier*. Ibsen's *Ghosts* was burlesqued on the English stage as *Ibsen's Goats*. Gilbert and Sullivan in *The Princess Ida* burlesqued Tennyson's *The Princess*.[13]

In the United States some of the most popular plays have been the subject of burlesques, which were performed at about the same time as the originals. Weber and Fields did burlesques of current plays, such as *The Christian Heart of Maryland, The Messenger Boy from Mars*. Plays like *Arizona, Barbara Fritchie, Bohemian Girl, Paid in Full, Anna Christie, The Girl of the Golden West, The Sheik, Lightnin', What Price Glory, The Front Page, Tobacco Road* and *The Caine Court Martial* were burlesqued. In other literary fields, in the United States, Bret Harte, Corey Ford, Wolcott Gibbs, Frank Sullivan, Donald Ogden Stewart, E. B. White, John Erskine, Ogden Nash, James Thurber, J. S. Perelman and others have practised the *genre*. Parodies have been published of Poe, Longfellow and Whitman among the poets, James Fenimore Cooper, Henry James, Ernest Hemingway and William Faulkner

[13] See, Allardyce Nicoll, The History of Early Nineteenth Century Drama (1930); Allardyce Nicoll, The History of the Late Nineteenth Century Drama (1946).

among the novelists, and others. Indeed, the parodists themselves, such as Bret Harte, have been parodied.

These illustrations do not give a complete history of the range of parody and burlesque. Other instances and data will be found in the references given.[14] They all show how universally parody and its lowly sister, the burlesque, have been practised everywhere.

IV. *Parody of Copyrighted Material: English Cases*

Against this background, we consider the English and American cases which have considered burlesque and parody as they relate to copyrighted material. In dealing with the English cases,

[14] R. P. Falk (ed.), American Literature in Parody (1955). And see, George Kitchin, Survey of Burlesques and Parody in English (1931). The writer sums up the quality of English parody, old and new, in this manner:

"Both in prose and poetry, but especially the latter, the art of parody has come to an astonishing height of excellence. And it is widespread. Talent of an order which formerly would have been regarded as little short of wonderful may appear anywhere. We have endeavoured, however, to show the direction in which the stream is flowing. The attack on the 'Decadents'; on the Press with all its collateral and attendant activities of advertising and business 'push'; the inverted use of vulgar literary forms by witty writers like Chesterton, Shaw, etc.; the revival of old forms of extravagance by Mr. Belloc, Mr. John Erskine, etc.; mere innocent imitations or hoaxes like those mentioned above; and lastly, the witty exposure of Utopian speculations on the diseases of society, these we take to be the main directions in which burlesque literature and parody have travelled in the last generation and in our own. The burlesque mannequin's parade of the novelists of the season also seems likely to be a periodical source of mirth. The origins of all those kinds, with the possible exception of that species indulged in by Shaw and Chesterson, we have shown to lie in the past." (P. 375)

A good illustration of a poetic parody is the following sonnet by J. K. Stephen, which imitates Wordsworth's poetic style in order to condemn it:

"Two voices are there: one is of the deep;
It learns the storm-cloud's thunderous melody,
Now roars, now murmurs with the changing sea,
Now bird-like pipes, now closes soft in sleep:
And one is of an old half-witted sheep
Which bleats articulate monotony,
And indicates that two and one are three,
That grass is green, lakes damp and mountains steep:
And, Wordsworth, both are thine: at certain times
Forth from the heart of thy melodious rhymes,
The form and pressure of high thoughts will burst:
At other times — Good Lord! I'd rather be
Quite unacquainted with the A B C
Than write such hopeless rubbish as thy worst."

This parody has been called by one writer "an example of parody pressed to its extreme limit as a direct form of literary criticism". He adds:

"This mock sonnet by J. K. Stephen will be seen to embody a very general, if rather too sweeping, estimate of the poetry of Wordsworth, whilst copying alike the nobler and the less exalted mannerisms of that poet, turn by turn; yet it preserves throughout these variations the authentic cadence of the sonnet form, serenely undisturbed.

"*Parody then, if well executed, has this merit, that it pours criticism*

we should bear in mind that the English Copyright Act of 1911[15] has codified the principle of "fair use" under the name of "fair dealing" by excluding from the acts constituting infringement:

> (i) Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary.[16]

As the English courts interpret this exclusion, it must first be determined whether there had been a substantial taking of material, after which the determination must be made whether the act constitutes "fair dealing". In *Johnstone* v. *Bernard Jones Publications*,[17] the court interpreted the proviso as affording "an additional protection to the defendants in copyright actions in the case of the acts specified in that proviso". So the test of substantiality still remains.[18] A similar provision is contained in the Canadian statute.[19] Canadian courts have followed English precedents both as to "fair use" and "fair dealing".[20]

Article 10 of the International Convention, ever since its adoption in the Berne Convention of 1886, has recognized the right of "fair use":

> As concerns the right of borrowing lawfully from literary or artistic works for use in publications intended for instruction or having a scientific character, or for chrestomathies, the provisions of the legislation of the countries of the Union and of the special treaties existing or to be concluded between them shall govern.

The countries signatories to the convention have also covered the matter by additional legislation.[21]

The problem of burlesque and parody must be related to "fair use" or "fair dealing". For both burlesque and parody are essentially a critique of the work imitated. As such, their standing, as the outline previously given shows, is that of an independent *genre*, in which men of letters have earned excellent reputations, both on the Continent and in the English-speaking world, through the originality of their compositions.

The first English case I refer to is *Hanfstaengl* v. *Empire Palace*.[22]

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swiftly into an unforgettable mould." (Encyclopedia Britannica (14th ed.), Article, Parody, Vol. 17, p. 337) (Emphasis added).

[15] 1 & 2 Geo. V, c. 46.

[16] Section 2(1) (i).

[17] [1938] 1 Ch. 599, at p. 603.

[18] See, Copinger and Skone James, The Law of Copyright (8th ed., 1949) pp. 135-136.

[19] R.S.C., 1952, c. 55, s. 17 (2) (a).

[20] See, Harold G. Fox, The Canadian Law of Copyright (1944) pp. 348-362, 425-432.

[21] See, Stephen P. Ladas, 1 International Protection of Literary and Artistic Property (1938), ss. 251-262, pp. 530-556.

[22] [1894] 3 Ch. 109, 70 L.T. Rep. (N.S.) 854.

Its significance lies in the fact that it is the first one in point of time to treat the problem whether what amounts to a *rough* outline of an original painting can be considered a copying and that subsequent cases in the lower courts have sought to apply to the problems before them the language used by the judges who determined it. By way of background, it should be pointed out that the Empire Theatre had put on *tableaux vivants* in which modern paintings were reproduced. In the action against the theater, the Court of Appeal held that such representation was not an infringement of the English copyright.[23] Two newspapers, the Daily Graphic and the Westminister Budget, sent artists to the theater who made rough sketches of the living pictures. From these sketches reproductions were prepared which appeared in the newspapers in conjunction with stories on the exhibition. Actions were instituted by the owners of the English copyrights, in which it was sought to restrain the defendants, the owners and publishers of the newspapers, from infringing the copyright on the pictures called "The Three Graces", "First Love" and others. The trial court (Sterling J.) ruled in favour of the plaintiffs and issued an injunction in each case restraining the defendants and their agents "from painting, publishing, or selling or offering for sale or otherwise disposing of any copies or colourable imitations of the copyrighted pictures of the plaintiff". On appeal, the judgment was reversed. English-fashion, the appeal judges gave their individual opinions, the gist of which are contained in the following quotations. Lindley L.J. wrote:

> The sketches are not intended to be, and are not in fact, copies of the pictures at all, neither are they intended to be, nor are they in fact, reproductions of the designs of the pictures. *They do not represent any of the beauties of* the pictures. They are *rough sketches* made for a very different purpose and answering a very different purpose, that purpose being, not to give an idea of the Plaintiff's pictures, but to *give a rough idea of what is to be seen at the Empire Theatre.* In giving that idea it is true that they also give a very rough idea of the subject represented in the Plaintiff's pictures. It is also true that in *West* v. *Francis* [5 B. & Ald. 737] Mr. Justice *Bayley* said: 'A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original'. But in applying this to any particular case the *degree of resemblance is all important, and the possibility of injury to the plaintiff must be regarded,* as was pointed out in *Dicks* v. *Brooks* [*ubi sup.*]. It is only by a great stretch of language and by the exercise of much imagination that these sketches can be regarded as copies of the Plaintiff's pictures or the designs thereof. . . . The Defendants have not, in

[23] *Hanfstaengl* v. *Empire Palace,* [1894] 2 Ch. 1, 70 L.T. Rep. (N.S.) 459.

fact, directly or indirectly, intentionally or unintentionally, made any use, certainly not any unfair use, of the Plaintiff's pictures or of the brains of their authors.

This, in my opinion, settles the case. In order to avoid misunderstanding, I will observe that I do not think that the competition test is necessarily conclusive. I agree that if the Defendants had copied the Plaintiff's pictures they would have infringed his rights, *even although the use made by the Defendants of such copies could in no way compete with the sale of the Plaintiff's pictures.* This was the case in *The Hanfstaengl Art Publishing Company* v. *Holloway* [*ubi sup.*], where copies of the Plaintiff's pictures were only used by being put on pill-boxes, but were nevertheless held to be infringements of his rights. Again, unauthorized sketches of pictures made on purpose to convey, and, in fact, conveying tolerably correct ideas of them would, I apprehend, be infringements of the copyrights in them, *although the sketches might not compete with the pictures or with any copies of them which their authors or their assigns might desire to make or sanction.* But where copying a picture never enters the head of a person who is said to have copied it or to have reproduced its design, where the question is whether a sketch *by such a person is or is not a copy or reproduction, then the impossibility of injury by competition may, I think, be fairly considered. The amusing sketches in* Punch *of the pictures in the* Royal Academy *are not, in my opinion, infringements of the copyrights in those pictures, although probably made from the pictures themselves. The application of similar principles to the different facts of this case leads me to a similar conclusion. In neither case is there any piracy, actual or intended.* [Pages 129-130; emphasis added]

Lopes L. J. wrote:

In this case admittedly they knew they were copying the pictures of some artist.

But are they copies within the meaning of the Act of Parliament? Are they piratical imitations of the Plaintiff's pictures—imitations of anything which was the artist's meritorious work? *They may correctly be described as rough, rude drawings, devoid of any artistic merit; there is no attempt to reproduce the merits of the originals—no attempt at art, much less fine art; that which is attractive in the originals is absent, and they appear to me to have little more claim to be regarded as copies of the originals than the* Berlin *woolwork pattern had to be regarded as a copy of* Millais' *picture*—The Huguenots—*which was considered in* Dicks v. Brooks. In that case, Lord Justice *James* said: 'Nobody would ever take it to be the print, nobody would ever buy it instead of the print. . . . *It is a work of a different class, intended for a different purpose, and, in my opinion, no more calculated to injure the print,* qua *print, or the reputation of the engraver, or the commercial value of the engraving in the hands of the proprietor, than if the same group were reproduced from the same engraving by waxwork at* Madame Tussaud's, *or in a plaster of* Paris *cast, or in a painting on porcelain. . . .* Whether dealing with it as a matter of law, or dealing with it, as we must do, as a matter of fact, I am satisfied that the appellants' pattern is not a copy or a piracy of any part of that which constituted the real

merit and labour of the engraver of the defendant's print.' Substituting the word picture for print and drawings for pattern, every word of this judgment appears to me applicable to the present case. No doubt there is a resemblance between the drawings and the Plaintiff's pictures, but not that kind of resemblance struck at by the statute. *Bayley*, J., in *West* v. *Francis* [*ubi seq.*],defined a copy to be 'that which comes so near to the original as to give every person seeing it the idea created by the original'. *Can it be said that these drawings come so near to the originals as to give those seeing them the same idea as that which would be created by the originals?*. . . .

In my judgment, these drawings in the *Daily Graphic* are *not copies of the Plaintiff's pictures or reproductions of their design* within the meaning of the statute, and, therefore, the appeal must be allowed. [Pages 132-133; emphasis added]

Davey L. J. wrote:

As was very well pointed out in the case of *Gambart* v. *Ball* and in *Dicks* v. *Brooks* [*ubi seq.*], the object of these Acts is both to protect the reputation of the artist from being lessened in the eyes of the world, and also to secure him the commercial value of his property — to encourage the arts by securing to the artist a monopoly in the sale of an object of attraction. The pictures of which these sketches are said to be a piratical copy or reproduction are works of art calculated to please the eye and the taste by a beautiful arrangement of form and colour, and to excite the emotions by the scenes depicted and thoughts suggested by the imagination or fancy of the artist. *As objects of attraction they depend, not on the mere outline or configuration, but on the artistic feeling and power with which the subject is treated. The sketches before us are mere outlines, descriptive more or less accurately of the grouping and posing of the figures, and to a limited extent of the subject-matter of the pictures, but destitute of everything which makes the pictures works of art, and constitutes their claim to protection under the Act.* What is a copy? I answer in the language of Mr. Justice *Bayley* in *West* v. *Francis* [*ubi seq.*]; 'A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original'. Of course there may be a coarse or clumsy copy; but in my opinion it is impossible to say that these woodcuts give the idea created by the originals — at any rate, with such fulness or completeness as to make them copies or reproductions. The point is not that these things are bad copies, *but that they are not intended, and do not purport, to reproduce the value and essential qualities of the pictures as works of art, and are therefore not copies or reproductions at all within the meaning of the Act.* [Pages 133-134; emphasis added]

From these statements the following general principles can be stated in summary: (1) a rude sketch which gives an impression of the painting or a complete caricature *à la Punch* is not a reproduction; (2) a reproduction giving merely the outline of a grouping of pictures, no matter how accurate, lacks the artistic qualities which make the originals works of art. So the court, while recognizing

the multiple objects of the copyright statute—(1) to protect the author in his proprietary right, and (2) to encourage the development of literature and the arts by recognizing the right in artistic and literary productions—refused to find infringement in caricature or crude outline.

Later cases have reaffirmed these principles. An English motion-picture company produced a silent film under the title *Pimple's Three Weeks* (*without the Option*), a vulgar parody on Elinor Glyn's *Three Weeks*. An action being instituted, recovery was denied.[24] The decision was based upon the fact that, both *Three Weeks* and the motion picture being indecent in character, protection should be denied. But, in the course of the opinion, Younger J. made these observations on parody and burlesque:

> Making all allowance for the fact that prior to the Act of 1911 literary copyright did not include the acting right, it certainly is remarkable that no case can be found in the books in which a burlesque even of a play has been treated as an infringement of copyright, although burlesque, frequently more distinguished than the thing burlesqued, is as old as Aristophanes, to take Mr. Hartree's example. It may well be that as far as English law is concerned one reason for this striking state of things is that the older cases insist upon the necessity of establishing that the alleged piracy is calculated to prejudice the sale or diminish the profits or supersede the objects of the original work, whereas it is well known that a burlesque is usually the best possible advertisement of the original and has often made famous a work which would otherwise have remained in obscurity. More probably, however, the reason is to be found involved in such observations as those of Lindley L. J. in *Hanfstaengl* v. *Empire Palace*, or in such a decision as that of the Court of Appeal in *Francis, Day & Hunter* v. *Feldman & Co.*, or *in the principle that no infringement of the plaintiff's rights take place where a defendant has bestowed such mental labour upon what he has taken and has subjected it to such revision and alteration as to produce an original result.* The same principle is illustrated in the law of designs by such cases as *Thom* v. *Syddall* and *Barran* v. *Lomas;* and if, in considering whether such a literary work as a novel has been infringed by such a thing as a cinematograph film, the true inquiry is, as I think it must be, whether, keeping in view the idea and general effect created by a perusal of the novel, such a degree of similarity is attained as would lead one to say that the film is a reproduction of incidents described in the novel or of a substantial part thereof, then in my opinion the answer in the present case must be in the negative. If, therefore, it were necessary for me to express an opinion upon this aspect of the case I should decide that on this ground also the plaintiff fails.[25]

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[24] [1916] 1 Ch. 261, 114 L.T. Rep. (N.S.) 356.

[25] *Glyn* v. *Weston Feature Film Company*, [1916] 1 Ch. 261, at pp. 268-269, 114 L.T. Rep. (N.S.) 356 (emphasis added).

The source of the views thus expressed was the *Hanfstaengl* case just referred to and another one to be referred to presently.[26] And the only reason given for not basing the decision upon that ground was that, as Mr. Justice Younger said, from the public's point of view a much more important consideration—immorality—called for the denial of all relief. Were I writing an opinion and were the English case a precedent I were asked to follow, the question whether, as some contend, it was dictum or not might be important.[27] Writing an article, I am willing to accept the statement by Mr. Justice Younger, be it dictum or not, as a correct interpretation of the English cases to which he referred, the first of which has already been analyzed.

In the other case referred to by Younger J., *Francis, Day & Hunter* v. *Feldman & Co.*,[28] the plaintiff had copyrighted a song entitled "You Made Me Love You (I Didn't Want To Do It)". The defendant published an answer to the song entitled, "You Didn't Want To Do It, But You Did". It was claimed that the song was a colourable imitation of the song of the plaintiff. The trial court held that there was infringement and granted an injunction.

On appeal, the higher court, "on a comparison of the two songs, decided that there had been no infringement".[29] In *Carlton* v. *Mortimer*,[30] the defendant produced a comic acrobatic performance under the title *Warzan and His Apes*. The plaintiff, to whom had been assigned the dramatic rights to Edgar Rice Burrough's novel *Tarzan and the Apes*, sought an injunction for infringement. In the performance, of which the plaintiff complained, two incidents were taken from the novel: (1) a baby found in a tent and taken out by an ape and nursed, and (2) a gun being handled by an ape. The judge concluded, however, that the parodical manner in which they were treated prevented their being deemed infringements, saying:

> *In the book both these features were serious, perhaps they might be described as sentimental. In the defendant's performance they were both comic to the last degree. They were intended to be comic and produce nothing but laughter. So far as these incidents might be said to be*

[26] *Francis, Day & Hunter* v. *Feldman & Co.*, [1914] 2 Ch. 728.

[27] Some writers consider the statement dictum in so far as it holds that a burlesque or parody *can never* be an infringement. See, 7 Halsbury's Laws of England (2nd ed., 1932), s. 893, p. 567; Copinger & Skone James, Law of Copyright (8th ed., 1948) pp. 129, 131-132; Clarke, Copyright in Industrial Design (1951) pp. 63, 83.

[28] [1914] 2 Ch. 728.

[29] *Francis, Day & Hunter* v. *Feldman & Co.*, [1914] 2 Ch. 728, at p. 734.

[30] (1917-1923) Maggillivray, Copyright Cases, p. 194.

taken from the book, he was satisfied that they were a mere burlesque of these incidents. Without going to the extent to which he understood Mr. Justice Younger went in the case of *Glyn* v. *Weston Feature Film Co.*, [1916] 1 Ch. 261, in saying that a burlesque never can be an infringement of copyright, he was of opinion that the burlesquing of these two trifling incidents and the production of the performance under a title which was somewhat similar in sound to, but yet different in fact from, the title of the novel did not amount to an infringement of the plaintiffs' rights. Therefore he saw no reason for granting the injunction which was prayed.[31]

So these English cases, even if we leave out the *Glyn* case, do establish two principles: (1) a rude, rough sketch or caricature of a whole work, such as a painting, does not exceed "fair dealing"; and (2) neither does a parody on incidents in a book.

Here it is well to point out that, if we eliminate the question of "fair use" and apply to parody and burlesque the rule applicable to ordinary copying or taking of actual scenes and incorporating them into a work,[32] all burlesque and parody would have to be considered infringement *per se*. For, taking a work of small compass, a picture or a poem, the parody or burlesque would in-

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[31] *Ibid.*, pp. 195-196 (emphasis added).

[32] *Leon* v. *Pacific Telephone & Telegraph Co.* (1933), 91 F. 2d 484, at p. 486 (9th Cir.). Neither under the guise of borrowing ideas nor under the claim of "fair use" can one appropriate an actual scene or sequence in a dramatic production (see, *Universal Pictures Co., Inc.* v. *Harold Lloyd Corporation* (1947), 162 F. 2d 354, at pp. 360-361 (9th Cir.)), or the entire development of a play (*Sheldon* v. *Metro-Goldwyn Pictures Corp.* (1940), 309 U.S. 390, at pp. 397-398). In the *Harold Lloyd* case, fifty-seven consecutive comedy scenes or twenty per cent of a feature were appropriated. In the *Sheldon* case, the Court of Appeals concluded that the play had been appropriated in its entirety. Commenting on the doctrine of "fair use" as expressed in its prior decision in *Nichols* v. *Universal Pictures Corp.* (1930), 45 F. 2d 119 (2nd Cir.), the court said:

"The plaintiffs challenge that opinion because we said that 'copying' might at times be a 'fair use'; but it is convenient to define such a use by saying that others may 'copy' the 'theme' or 'ideas', or the like, of a work though not its 'expression'. At any rate, so long as it is clear what is meant, no harm is done. In the case at bar the distinction is not so important as usual, because so much of the play was borrowed from the story of Madeleine Smith, and the plaintiffs' originality is necessarily limited to the variants they introduced. Nevertheless, it is still true that their whole contribution may not be protected; for the defendants were entitled to use, not only all that had gone before, but even the plaintiffs' contribution itself, if they drew from it only the more general patterns, that is, if they kept clear of its 'expression'. We must therefore state in detail those similarities which seem to us to pass the limits of 'fair use'. Finally, in concluding as we do that the defendants used the play pro tanto, we need not charge their witnesses with perjury. With so many sources before them they might quite honestly forget what they took; nobody knows the origin of his inventions, memory and fancy merge even in adults. Yet unconscious plagiarism is actionable quite as much as deliberate." (*Sheldon* v. *Metro-Goldwyn Pictures Corp.* (1936), 81 F. 2d 49, at p. 54 (2nd Cir.)).

See, *Alfred Bell & Co., Ltd.* v. *Catalda Fine Arts, Inc.* (1951), 191 F. 2d 99, at pp. 102-104 (2nd Cir.).

evitably have to be cast in the form of the original. And if that be infringement, then the literary history and the cases just cited would lose all validity. For they clearly hold that a rude reproduction or a caricature of a painting *à la Punch*, or a parody of scenes in a book or play, the effect of which is to criticize, mock and "spoof", as it were, the original is permissible. And the American cases which have decided the matter, although few in number, do not in the main go counter to this view.

V. *Parody of Copyrighted Material: American Cases*

American writers on the subject have generally expressed the view that parodies are within the limits of "fair use".[33] The very meaning of "fair use" implies the use of copyright material without the writer's consent and despite the monopoly granted him by the copyright.[34]

I give a brief review of the American cases. In *Bloom & Hamlin* v. *Nixon* an actress imitated another actress in singing the chorus of a copyrighted song. The court held that the parody was not an infringement of the copyright, saying:

> Surely a parody would not infringe the copyright of the work parodied, merely because a few lines of the original might be textually reproduced. No doubt, the good faith of such mimicry is an essential element; and, if it appeared that the imitation was a mere attempt to evade the owner's copyright, the singer would properly be prohibited from doing in a roundabout way what could not be done directly. But where, as here, it is clearly established that the imitation is in good faith, and that the repetition of the chorus in an incident that is due solely to the fact that the stage business and the characteristics imitated are inseparably connected with the particular words and music, I do not believe that the performance is forbidden either by the letter or the spirit of the act of 1897. The owner of the copyright is entitled (upon the assumption heretofore stated) to be protected from unauthorized public performance or representation of the song, in order that whoever might desire to hear 'Sammy' sung in public would be obliged to attend a performance of The Wizard of Oz; and, as it seems to me, he still has that protection. The song is only sung publicly in that extravaganza. Fay Templeton does not sing it, she merely imitates the singer; and the interest in her own performance is due, not to the song, but to the degree of excellence of the imitation. *This is a distinct and different variety of the histrionic art from the singing of songs, dramatic or otherwise, and I do not think that the example now before*

[33] Arthur W. Weil, American Copyright Law (1917), s. 1142, p. 432; cf., *op. cit.*, s. 1097, p. 418; Leon H. Amdur, Copyright Law and Practice (1936) pp. 759, 762; Samuel Spring, Risks and Rights (1952), s. 118, p. 186; Alexander Lindey, Plagiarism and Originality (1952) p. 43.

[34] *Toksvig* v. *Bruce Pub. Co.* (1950), 181 F. 2d 664, at p. 666 (7th Cir.).

the court has in any way interfered with the legal rights of the complainants.[35]

This decision was followed in a later case in which the singing of a single verse and chorus of a copyrighted song in imitation of a well-known singer was held permissible.[36] In a later case still, however, the same court, speaking through another judge, distinguished these cases by holding that where the imitation resulted in singing an entire song there is infringement:

> The defendant admits that she sings the copyrighted song with musical accompaniment, but she says that she does so merely to mimic the complainant Irene Franklin Green. She contends that she gives impersonations of various singers, including said complainant, and, as incidental to such impersonations, sings the songs they are accustomed to sing. The mimicry is said to be the important thing; the particular song, the mere incident. But I am not satisfied that, in order to imitate a singer, it is necessary to sing the whole of a copyrighted song. 'The mannerisms of the artist impersonated', to use the language of the defendant's brief, may be shown without words. And if some words are absolutely necessary, still a whole song is hardly required. And if a whole song is required, it is not too much to say that the imitator should select for impersonation a singer singing something else than a copyrighted song.[37]

In another case by the same court a cartoon entitled *Nutt and Giff*, imitating the characters Mutt and Jeff, was held to infringe. The court was careful to say:

> A copyrighted work is subject to fair criticism, serious or humorous. So far as is necessary to that end, quotations may be made from it, and it may be described by words, representations, pictures, or suggestions. It is not always easy to say where the line should be drawn between the use which for such purposes is permitted and that which is forbidden.
>
> One test which, when applicable, would seem to be ordinarily decisive, is *whether or not so much as [sic] has been reproduced as will materially reduce the demand for the original.* If it has, the rights of the copyright have been injuriously affected. A word of explanation will be here necessary. The reduction in demand, to be a ground of complaint, must result from the partial satisfaction of that demand by the

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[35] *Bloom & Hamlin* v. *Nixon* (1903), 125 Fed. 977, at pp. 978-979 (C.C.E.D. Pa.) (emphasis added). See, *Jerome H. Remick & Co.* v. *American Auto Accessories Co.* (1924), 298 Fed. 628, at p. 632 (D.C. Ohio): "A parody upon the singing of a copyrighted song has been held not to infringe the copyright".

[36] *Green* v. *Minzensheimer* (1909), 177 Fed. 286 (C.C., N.Y.).

[37] *Green* v. *Luby* (1909), 177 Fed. 287, at p. 288 (C.C., N.Y.). The Court of Appeals for the Ninth Circuit has limited the case to the specific ruling and has refused to extend its scope so as to make the recording on a phonograph record of a poem with music a "copying" and an infringement of the copyright of the poem: *Corcoran* v. *Montgomery Ward & Co., Inc.* (1941), 121 F. 2d 572, at p. 574 (note 2) (9th Cir.).

alleged infringing production. A criticism of the original work, which lessened its money value by showing that it was not worth seeing or hearing, could not give any right of action for infringement of copyright.[38]

These cases concede that parody may be independent creation, but hold it to infringe if it covers the whole work. But it is to be borne in mind that the cases before these courts were (1) cases involving songs in which the words used were the actual words of the copyrighted song, or (2) cases involving comic characters which it was sought to imitate and supplant by other comic characters. It might be conceded that in the case of a brief song, especially where the music is also sung, plagiarism might exist, although the purpose be to mimic only. So also in the case of a cartoon it can be seen readily that a rival cartoon copying the characters, with slight modification of the names, would be infringement.[39] But these holdings do not warrant the conclusion that a

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[38] *Hill* v. *Whalen & Martell, Inc.* (1914), 220 Fed. 359, at p. 360 (D.C., N.Y.).

[39] *Nutt and Giff* is outright imitation of *Mutt and Jeff* and not even a colourable change of names. The Court of Appeals for the Second Circuit has read the *Hill* decision as finding direct "reproduction" in *King Features Syndicate* v. *Fleisher* (1924), 299 Fed. 533, at p. 536 (2nd Cir.). Holding that the copyright of a book of cartoons picturing "Barney Google and Spark Plug" or "Sparky" was infringed by a doll named "Sparky", which was an exact reproduction of the horse in the cartoon, the court said:

"In the *Hill* case, the complainant was the licensee of cartoon characters known as 'Mutt and Jeff'. The defendants produced a dramatic performance calling it 'In Cartoonland.' The characters were costumed exactly like the figures of 'Mutt and Jeff', the cartoons, and their actions and speech were in harmony with the spirit of the cartoons. The court enjoined the defendants, upon the ground that representation of 'Mutt and Jeff' dramatically was calculated to injuriously affect the copyright of the cartoons. A reproduction in materials of the copyrighted cartoon character, it would seem, is equally a violation of the copyright of the cartoon. *Empire Amusement Co.* v. *Wilton* (C.C.) 134 Fed. 132. These conclusions are supported by the English authorities. *Bradbury, Agney & Co.* v. *Day*, 32 T.L.R., 1916, 349; *Turner* v. *Robinson*, 10 Ir. Ch. 121, 510.

"The protection accorded the owner of the copyright *is of the intellectual product of the author.* It is intended to protect any species of publication which the author selects to embody his literary product. *Holmes* v. *Hurst*, 174 U.S. 82, 19 Sup. Ct. 606, 43 L. Ed. 904. The question is: To what is the artist or author entitled as his conception and what if such original conception has been appropriated? He is entitled to any lawful use of his property whereby he may get a profit out of it. *Falk* v. *Donaldson* (C.C.) 57 Fed. 32. It is the commercial value of his property that he is protected for, to encourage the arts by securing to him the monopoly in the sale of the object of the attraction." (Emphasis added.)

See *Fleischer Studios, Inc.* v. *Freundlich* (1934), 73 F. 2d 276 (2nd Cir.), holding that a two-dimensional copyrighted cartoon character, Betty Boop, was infringed by a three-dimensional doll recognizable as the character, although not called by that name. And see, Note: The Protection Afforded Literary and Cartoon Characters (1954), 68 Harv. L. Rev. 349, at pp. 356-363.

parody or burlesque of a copyrighted play or novel or a portion of either necessarily infringes.

An interesting opinion was filed on May 5th, 1955, in the Southern District of California, in an action instituted by Loew's Inc. on June 10th, 1953, against the Columbia Broadcasting Company, American Tobacco Company and the well-known comedian, Jack Benny, to enjoin the performance of a humorous sketch, *Autolight*, burlesquing the motion picture *Gaslight*, the literary property of Loew's.[40] The complaint, in addition to injunction, asked for damages for copyright infringement and unfair competition, but at the trial damages were waived.

The opinion and the pleadings in the case disclose these facts. Patrick Hamilton, an English subject and one of the plaintiffs, wrote an original play entitled *Gaslight* before December 5th, 1938, which was copyrighted under English law on February 17th, 1939. American copyright was secured on November 18th, 1941. On December 5th, 1941, the play was produced on Broadway under the title of *Angel Street*. It had a successful Broadway run over a period of thirty-seven months, with 1,295 performances. In 1942, *Gaslight* was republished and copyrighted in the United States under the title of *Angel Street*. Loew's acquired exclusive motion picture rights to it on October 7th, 1942. Commencing in December of that year, they expended $2,458,000 in the production and distribution of an original motion picture of the play, in which Charles Boyer, Ingrid Bergman, Joseph Cotton and other artists in the motion picture field acted, and the picture was released for international distribution on May 5th, 1944. Loew's copyrighted the photoplay and it was exhibited in the United States and in fifty-seven foreign countries. Approximately $4,857,000 was received in gross rentals. The picture was withdrawn from domestic release in November 1946. The international distribution still continues, but no re-issue of the picture has been made.

On October 14th, 1945, while *Gaslight* was being distributed in the United States, Benny produced a fifteen minute radio burlesque with himself and Ingrid Bergman in the leading rôles. Benny burlesqued Charles Boyer and Ingrid Bergman her own screen rôle. Benny's writers had viewed the play *Angel Street* and the

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The conclusion reached in the *Hill* case can also be justified under the doctrine of unfair competition. See, *Chaplin* v. *Amador* (1928), 93 C.A. 358, at pp. 362-366; 269 P. 544, at p. 546; *Jones* v. *Republic Productions, Inc.* (1940), 112 F. 2d 672 (9th Cir.).

[40] *Loew's Inc.* v. *Columbia Broadcasting System, Inc.*, 1955, D.C. So. Cal. (No. 15602-C), 131 F. Supp. 165.

motion picture *Gaslight* before writing *Autolight*. Loew's made no claim of infringement as to the radio show, though their consent was not asked or given. Indeed, they had no notice of its production. Significant of the attitude of Loew's towards the radio burlesque is the fact that before its showing at the United States Army Redistribution Center in Santa Barbara, from which it was put on the National Broadcasting System, they, at Benny's request, sent a print of the photoplay *Gaslight* to the center for exhibition in the week preceding the radio programme.

On January 27th, 1952, Columbia produced a half-hour television programme, in the course of which Benny and Barbara Stanwyck did a fifteen-minute burlesque on *Gaslight*, which was broadcast over the Columbia Broadcasting System and sponsored by the American Tobacco Company. The burlesque was also kinescoped, that is, recorded on motion picture film for later transmission over those stations of the network which were unable to receive the "live" broadcast. In May 1953 Columbia began the preparation of a motion picture for television burlesquing, *Gaslight*, again starring Benny and Barbara Stanwyck. On receiving notice of this, Loew's served notice, as they had done after the "live" broadcast in January of the same year, that they considered the prior "live" performance and the proposed "remaking" an infringement of their copyright. Between September and December 1953, the Benny television programme reached millions of viewers and Benny received compensation for his services from Columbia, which in turn received compensation from the American Tobacco Company.

The opinion filed by Judge Carter, after a detailed comparison of *Gaslight* and *Autolight*, finds that: (1) the locale and period of the works are the same; (2) the main setting is the same; (3) the characters are, generally, the same; (4) the story points are practically identical; (5) the development of the story, the treatment (except that defendants' treatment is burlesque), the incidents, the sequences of events, the points of suspense and the climax are almost identical; and, finally, (6) there has been a detailed borrowing of much of the dialogue with some variation in wording. In view of these findings, the conclusion is stated that

> There has been a substantial taking by defendants from the plaintiffs' copyrighted property. [Page 171]

In a case of this character, a mere comparison of scripts would not be suitable or fruitful in determining plagiarism. To make a qualitative and quantitative comparison of the two plays one

would have to describe, in narrative form, everything that a viewer saw on the screen. So the most adequate comparative test is the audio-visual one—the impression of both works on the same viewer. The opinion states that this test was made and that the conclusion, that there was substantial appropriation as outlined, was derived from it and a reading of the scripts. This being the case, the burlesque complained of could be considered a mere subterfuge for appropriating the original Hamilton treatment in the play and motion picture and the conclusion reached could be concurred in upon that ground, although not stated in the opinion. For that is an accepted and legally valid principle. The legal norm upon which the conclusion is based, however, is stated in one of the subheads in the opinion in this manner:

> (g) A substantial taking by use of burlesque constitutes infringement. [Page 182]

The opinion amplifies:

> In the instant case, the economic value of plaintiffs' property far exceeds the value of the defendants' work. Loew's expenditure in production and distribution of 'Gaslight' amounted to $2,458,000 as compared with an estimated $64,883.66 by the defendants in their production of the 1952 and 1953 burlesque exclusive of American's compensation to Benny. Television is engaged in active competition with motion pictures. The taking was for commercial gain for use in a competing entertainment field.
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> The serious, near tragic vein of the original, 'Gaslight', was converted into the broad, low comic vein of the burlesque. Benny, using gags, puns, exaggerated mimicry, slapstick and distortion, all matters within the common fund of the public domain, has taken a substantial part of plaintiffs' property, 'Gaslight', and inverted the *mood* from serious to humorous. Tragedy and comedy, like love and hate, are but opposite faces of the same coin. Defendants have transposed the work, from the serious to the comic vein. This is analogous to the situation in *Leon et al.* v. *Pacific Telephone and Telegraph Company* (9 Cir., 1937) 91 F. 2d 484, supra, when defendant took plaintiff's copyrighted telephone book and inverted the list from an alphabetical one to a numerical one. Our case tests the statement of the court therein that no case can be found holding that 'wholesale copying and publication of copyrighted material can ever be fair use'. (91 F. 2d at page 486)
>
> From the discussion heretofore and the authorities collected, we conclude that plaintiffs have a property right in 'Gaslight' which defendant may not legally appropriate under the pretense that burlesque as fair use justifies a substantial taking; that parodized or burlesque taking is to be treated no differently from any other appropriation; that, as in all other cases of alleged taking, the issue becomes first one of fact, i.e. what was taken and how substantial was the taking; and if it is determined that there was a substantial taking, infringement exists. [Pp. 182-183]

It will thus be seen that the opinion stresses unduly the fact that the burlesque is used as a means of gain. This fact is also adverted to elsewhere in the opinion:

> We conclude that it is not incumbent on the copyright holder to show either damage, or a diminuting of the value of his property or a lessening of the demand for the copyrighted work. On the other hand, the fact that the infringing work competes with the copyrighted one or has been issued for commercial gain, rather than in the interests of advancement of learning is a factor to be considered in determining the extent of fair use, and in determining whether the taking was substantial. [Pp. 184-185]

Material gain by writers through parody and burlesque is not of modern origin. While, proverbially, remuneration for literary and artistic efforts has been scant, it may be assumed that parodists from the time of the Greeks through the great English parodists, who flourished in England before and after the enactment of the Statute of Anne in 1710, received some material compensation for their work. Thus they competed in the market place with the authors whom they parodied, not only for glory but for monetary gain. The higher remuneration commanded today by "live" television and "kinescopic" performances is, therefore, merely a transmutation into modern terms of a fact which has been incidental to the practice of parody and burlesque at all times. As one of the objects, although a secondary one, of the copyright law has always been the protection of the proprietary right of the author, the fact that this property may have acquired greater value in modern times and that those who parody another author's work may receive more abundant remuneration should not obscure the fact that the primary consideration of the English copyright law—and of ours, following the enactment of the first copyright law modelled after the Statute of Anne, in obedience to the American constitutional grant of power—was and is to advance the progress of arts and science. In giving effect to this objective, material gain is not, as the opinion assumes, primary, but secondary. There is ground for even more serious disagreement with the theory to which the opinion gives assent, that, in order to determine plagiarism, parody or burlesque should be judged in the same manner as actual or serious taking. Under a rigid application of this criterion, parody or burlesque would almost always infringe. For, under the law of taking of serious material, the appropriation of even two or three scenes constitutes infringement.[41] If this test were applied, it would, in many instances,

[41] See footnote 32. And see, *Chappell & Co.* v. *Fields* (1914), 210 Fed.

deny altogether the application of the doctrine of "fair use" to parody or burlesque. In other cases it would contract rather than expand the concept.

Parody and burlesque, viewed in their historical perspective, do not justify this approach, which might result in denying to them the status as a distinct literary *genre* they have had in the English-speaking world of letters both before and after the enactment of the Statute of Anne in 1710.

VI. *For an Expanded Test*

The law of copyright must be equated with the primary purpose of promoting the progress of science and arts. "Fair use" was evolved as a concept by the courts in the English-speaking world with a view to aiding the development of science and arts by allowing use of copyrighted materials despite the monopoly of copyright. Its application to parody and burlesque must take into consideration the elements the courts have applied to it, namely: (1) the quantity and importance of the portions taken; (2) their relation to the work of which they are a part; and (3) the result of their use upon the demand for copyrighted material.[42]

If, however, we confine its application to the first element only —the quantitative and qualitative element, applicable when material is used directly, in serious reproduction—we in effect reject, or restrict unduly, its application to parody or burlesque. In the light of literary history and the purposes of the copyright laws, we should extend rather than constrict the boundaries of "fair use". The controlling question should be, not whether the parody or burlesque contains the skeleton or outline of the play or story it criticizes or ridicules, but whether it is true parody or a mere subterfuge for appropriating another person's intellectual creation. "Fair use" thus becomes determinable in the light of all the valid judicially established criteria, including the result to be achieved, and in consonance with literary reality. For parody, under accepted definitions, is a type of composition which (1) seeks, in good faith, to criticize, caricature, mock, ridicule and distort the intellectual

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864, at pp. 865-866 (2nd Cir.); *Kustoff* v. *Chaplin* (1941), 120 F. 2d 551, at p. 560 (9th Cir.); *Heim* v. *Universal Pictures Co.* (1946), 154 F. 2d 480, at p. 487 (2nd Cir.); *Arnstein* v. *Porter* (1946), 154 F. 2d 464, at pp. 468-469 (2nd Cir.); Note, Literary and Artistic Rights (1950), 23 A.L.R. (2) 244, at pp. 337-339, s. 28.

[42] *Sampson & Murdock Co.* v. *Seaver-Radford Co.* (1905), 140 Fed. 539, at pp. 541-544 (1st Cir.); *Mathews Conveyor Co.* v. *Palmer-Bee Co.* (1943), 135 F. 2d 73, at p. 85 (6th Cir.); *Toksvig* v. *Bruce Pub. Co.*, *supra*, at p. 664. And see, Yankwich, *op. cit.*, footnote 5, p. 213.

product of another, and (2) not to imitate or reproduce it as written, and (3) which, despite its own originality or merit, lacks the artistic and literary quality of the original. And, if a particular parody or burlesque achieves this, the fact that it is executed within the frame or around the outline of a serious work—the fact that there is (as there must be in any parody or burlesque) casual imitation—should not deprive it of standing as an independent literary or artistic creation in our courts. Parallelism stemming from similarity of "order of events" is not of universal application and is not a conclusive test in all copyright cases.[43]

It is a truism that plagiarism does not exist unless there is substantial copying "of the whole or of a material part" of the copyrighted work.[44] Similarity between the productions involved, while not always conclusive, because there may have been "independent conception", is nevertheless an essential element of plagiarism.[45] Without similarity there can be no plagiarism. And, conversely, dissimilarity negatives its existence.

Apposite here is the following language from a high English court:

> The member of the public who is supposed to be likely to be deceived must, to start with, be assumed to know what he was wanting to see or hear. Thus, in the present case, he must be presumed to know that *what he wanted was to hear the song The Man Who Broke the Bank at Monte Carlo.* It seems inconceivable that when, or if, he bought a ticket for the motion picture, he *imagined he was going to hear a performance of the familiar song. The two things are completely different, and incapable of comparison in any reasonable sense. The thing said to be passed off must resemble the thing for which it is passed off. A frying pan cannot be passed off as a kettle.*[46]

[43] *Shipman* v. *R.K.O. Pictures, Inc.* (1938), 100 F. 2d 533, at p. 536 (2nd Cir.), which cites with approval *Barnes* v. *Minor* (1903), 122 Fed. 480 (D.C., N.Y.).

[44] *Parris* v. *Hexamer* (1880), 99 U.S. 674, at p. 676; and see, *Kustoff* v. *Chaplin* (1941), 120 F. 2d 551, at pp. 560-561 (9th Cir.); *Toksvig* v. *Bruce Pub. Co.* (1950), 181 F. 2d 665, at pp. 666-667 (7th Cir.); and see, 17 U.S.C.A., s. 1.

[45] *Harold Lloyd Corp.* v. *Witwer* (1933), 65 F. 2d 1, at pp. 16-17 (9th Cir.); *Becker* v. *Loew's, Inc.* (1943), 133 F. 2d 889, at p. 892 (7th Cir.); *Twentieth Century Fox Film Corp.* v. *Stonsifer* (1944), 140 F. 2d 579, at p. 583 (9th Cir.); *Universal Pictures Co.* v. *Harold Lloyd Corp.* (1947), 162 F. 2d 354, at p. 361 (9th Cir.); *Overman* v. *Loesser* (1953), 205 F. 2d 521, at p. 523 (9th Cir.). And see, the writer's opinion in *Cain* v. *Universal Pictures, Inc.* (1942), 47 F. Supp. 1013, at pp. 1016-1017 (D.C. Cal.); Copinger and Skone James, Law of Copyright (1948) pp. 119-122.

[46] *Francis Day & Hunter, Ltd.* v. *Twentieth Century-Fox Film Corp.* (1939), 56 T.L.R. 9, at p. 12 (emphasis added). The language is quoted and approved by the court in *Becker* v. *Loew's, Inc., supra,* footnote 45, p. 893. And see, *Affiliated Enterprises, Inc.* v. *Gruber* (1936), 86 F. 2d 958 (1st Cir.); *Fuller* v. *The Blackpool Winter Garden & Pavilion Co.*, [1895] 2 Ch. 429, which is cited with approval by the Court of Appeals

While the Judicial Committee of the Privy Council was there speaking of a claim of unfair competition, the statement is applicable to the problem before us. As a true burlesque is not an imitation but a criticism of an original work, ordinarily it cannot be an imitation of or be "passed off" as the original work.[47] It follows that a rigid formula which would apply to parody and burlesque the sole test of substantiality of copying to be determined by similarity of sequence or "order of events" in story development, and which would disregard all others, finds no support in the literary history of the English-speaking world. More, the use of such a formula would destroy the comic art, so important and rare, of which parody and burlesque are a part.

To conclude, an author, dramatic or other, should be protected from the unconscionable pilferers who, in the words of Robert Burton, "lard their lean books with the fat of others' works".[48] Because, from the very inception of literary history among the Greeks, and in the English-speaking world both preceding and following the enactment of the copyright laws, parody and burlesque have been recognized as independent intellectual creations, we should not destroy them through judicial fiat by applying to them tests which fail to take into account this historical fact. Rather should we encourage those endowed with and practising the comic spirit to continue, in the words of Joseph Addison, to draw persons or characters "quite unlike themselves".[49]

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for the Ninth Circuit in *Corcoran* v. *Montgomery Ward & Co.* (1941), 121 F. 2d 572, at p. 574, Note 2 (9th Cir.).

[47] Compare the following: "If the burlesque consists of what is, in substance, a new work parodying an existing one but not making substantial use of its language or incidents, it is submitted there is no infringement. But a work which slavishly used the plot and incidents of another would not be defensible under the cloak of burlesque." (Copinger and Skone James, The Law of Copyright (1948, 8th ed.) p. 132)

The statement contains an obvious contradiction. For if it be granted that a particular burlesque is "a new work parodying an existing one", how could it avoid, especially in the case of a story or dramatic composition, making substantial use of "plot or incident"? If it did, it would not be parody at all, but, at most, a *pastiche* merely imitating the manner, as Marcel Proust did in his *Pastiches*—referred to earlier in the text. And if the right be so restricted, there could be no future enrichment of the treasury of true parody and we would be interpreting the law of copyright in a manner not consonant with the constitutional aim, "to promote the progress of science and useful arts" (U.S. Const., art. I, s. 8, cl. 8).

[48] The whole passage is worth quoting: "And as those old Romans robbed all the cities of the world to set out their bad-sited Rome, we skim off the cream of other men's wits, pick the choice flowers of their tilled gardens to set out our sterile plots. They lard their lean books (so Jovious inveighs) with the fat of others' works, the blundering thieves." (Robert Burton, Anatomy of Melancholy, edited by Floyd Dell and Paul Jordan-Smith, 1948, p. 18).

[49] Joseph Addison, The Spectator, Dec. 15th, 1711.